

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
SUPREME COURT NO. 20040079

Richard A. Engwicht III,)
)
 Plaintiff-Appellant,)
)
 v.)
)
 Alan J. Lako dba Lako Drilling,)
)
 Defendant-Appellee.)

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STATE OF NORTH DAKOTA

APPEAL FROM THE DISTRICT COURT
CASS COUNTY, NORTH DAKOTA
EAST CENTRAL JUDICIAL DISTRICT
CASS COUNTY CIVIL NO. 09-02-C-0466
THE HONORABLE CYNTHIA A. ROTHE-SEEGER, PRESIDING

BRIEF OF APPELLEE

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STATEMENT OF THE ISSUES

Were the District Court's findings of fact erroneous?

STATEMENT OF THE FACTS

Plaintiff Richard Engwicht lives southwest of Oakes, North Dakota. (Transcript “T” at 16.) In 1996 the water flow from Engwicht’s artesian well dropped from around 6 gallons per minute to less than two gallons per minute. (T at 17.) Because the water flow was unacceptable to Engwicht, in May 1996 Engwicht telephoned Defendant, Alan Lako d/b/a Lako Drilling (“Lako”) and hired Lako to drill a well at his property. (T at 18-19; 149.)

Although Engwicht and Lako discussed Lako drilling a deep artesian well, during the telephone conversation Engwicht hired Lako to drill a surface well first and then, if no water was found, to drill an artesian well. (T at 18; 149.) Lako told Engwicht that Lako charged by the foot for drilling wells. (T at 18; 150.) Lako told Engwicht he charges for all drilling whether a well is created or not and that Lako does not guarantee water will be found. (T at 151.) Lako made no warranty as to the volume of water which would be produced. (T at 151.) Knowing that Lako charged by the foot and knowing that Lako was not guaranteeing results, Engwicht asked Lako to come to his house to drill. (T at 18-19.)

The first step in drilling a water well is to cement in a surface casing. (T at 80.) A surface casing is created by drilling an oversized hole 12 inches in diameter. (T at 80.) A six-inch casing is inserted inside this hole. (T at 80.) The hole is then pumped full of cement. (T at 80.) The cement locks the casing into the earth so if water flows from the well the flow can be controlled. (T at 80.)

The second step in drilling a water well, after the cement casing has hardened, is to drill an open hole to the ground water formation. (T at 81.)

If the open hole finds water, the third step is to case the hole by inserting pipe with a screen into the hole. (T at 83-84.) Casing is a piece of pipe with openings to allow water to flow to the surface. (T at 84.)

The fourth step is to gravel pack the well by filling the space between the hole and the outside of the pipe casing with graded sand. (T at 85.)

At the time the parties entered into their contract, Lako charged customers \$1,000 and \$5 per linear foot for drilling a test hole. (T at 89.) A test hole is simply a hole in the ground which is not further developed. (T at 89.) Lako charged \$1,000 and \$10 per linear foot for a fully developed cased and packed well that a customer accepted. (T at 89.) Lako charged \$7.00 per linear foot plus \$1,000 for a test well. (T at 89.) A test well is a well which, after it was cased, is refused by the customer. (T at 90.) A test well is cheaper than a well accepted by the customer because Lako is able to retrieve some of its material when the well is closed. (T at 90.) Lako charges for each separate hole it drills. (T at 90.) Lako's pricing method was discussed with Engwicht. (T at 18; 90-91.)

In June 1996, Lakoa sent his employees, including Dale Lako, to Engwicht's residence to drill a shallow water well. (T at 19.) Dale drilled a test hole to a depth of 240 feet, in the hopes of finding shallow water. The shallow well yielded no water. (T at 25, 86) During this visit, Dale indicated to Engwicht that Lako could drill additional shallow wells or, in the alternative, Engwicht could hire Lako to drill a deeper artesian well. (T at 25.) Dale and Engwicht discussed pricing for the artesian well. (T at 91.)

Dale told Engwicht he believed if an artesian well was attempted it should yield water. (T at 91.) Engwicht asked what happened if he did not want to develop the well. (T at 91.) Dale explained that if Lako drilled the hole and found no water, then it would be a test hole. (T at 91.) Dale explained that if Lako thought the formation produced water that Lako would put a screen and casing into it and it would become a test well and cost \$7.00 per foot. (T at 91.) Finally Dale explained if Engwicht accepted the test well and wanted to use it, then it would become a well and it would cost \$10.00 per foot. (T at 91.)

Engwicht told Dale that his old well was 1100 feet deep. Based on this information, Dale indicated it would cost Engwicht approximately \$12,000 for a completed artesian well. (T at 88.) Dale indicated that Lako would require Engwicht to pay half of the cost up front. (T at 88.) Engwicht agreed to have Lako drill an artesian well. (T at 28.)

In June or July 1996, Engwicht issued a check to Lako for \$6,000, half of the estimated cost of an artesian well. (T 28.) Lako drilled an artesian hole to a depth of approximately 1200 linear feet. This hole was cased and gravel packed. (T at 92.) This well only produced water at 2 ½ gallons per minute. (T at 29; 92.) Because the flow was low on this well (the same as the well Engwicht was replacing), Lako attempted to “clean” the screen to determine if debris was blocking the water flow. (T at 30; 93.) Cleaning the screen did not increase the flow rate. (T at 94.)

Before finalizing or abandoning this well, Lako, with Engwicht’s knowledge and agreement, attempted to remove the casing from the hole so Lako could wash the hole.

(T at 94.) Lako's attempt to remove the casing was unsuccessful. (T at 94.) The casing broke when Lako tried to remove it. (T at 94.) Lako tried to drill through the broken casing and was unable to do so. (T at 94; 97.) This hole was abandoned and a new hole was started. (T at 97.)

In August and September 1996, Lako drilled a second artesian hole for Engwicht to a depth of 1260 linear feet. (T at 100.) This hole was not cased or patched. It also produced water at 2 ½ gallons per minute. (T at 100.) Engwicht was unsatisfied with this well as well. (T at 103.) Engwicht indicated the well was not producing enough water. (T at 103.) Dale explained to Engwicht that Engwicht could accept the second artesian well; Lako could drill another artesian hole; Lako could drill another shallow well, or that Engwicht could hook up to rural water. (T at 103-104.) Dale and Engwicht discussed Lako's charges if additional holes were drilled. (T at 104.) Engwicht indicated he did not want to incur any more charges. (T at 103.) Engwicht asked Dale to close up this well. (T at 105.)

While Dale was drilling the second artesian well, Dale noticed shallow water. (T at 106.) After Engwicht asked Dale to close the second artesian well, Dale attempted to develop the shallow water. Instead of completely closing the second well, Dale developed the hole into a shallow well which produced pumped water at the rate of 11 gallons of water per minute. (T at 106.) Lako offered to finish this shallow well for \$12.00 a foot. (T at 106.) Engwicht wanted Lako to do the work for the amount already paid. (T at 106.) Lako refused. (T at 106.) Because the parties could not reach an

agreement for finishing this shallow well, Lako finished closing the well and concluded its work at Engwicht's residence. (T at 106.)

Engwicht initiated this action against Lako seeking breach of contract and negligence damages. (A at 3-5.) During trial, Engwicht abandoned its negligence cause of action. (T at 68.)

Lako counterclaimed against Engwicht seeking damages in the amount of \$11,600, the difference between what Engwicht agreed to pay for Lako's services and the \$6,000 paid by Engwicht. (A at 7-11.)

After a one day bench trial, the District Court found: 1) the parties entered into an oral contract for services; 2) Engwicht agreed to pay for Lako's services regardless of whether a well was created; 3) Engwicht agreed to pay Lako by the foot for drilling work performed by Lako; and 4) that Engwicht failed to pay Lako for services performed by Lako. (A at 17-21.) After the trial, Lako reduced its demand from \$11,600 to \$4,500. The trial Court awarded Lako damages of \$4,500 and \$80 in costs. (A at 21.)

LAW AND ARGUMENT

I. THE DISTRICT COURT'S FINDINGS OF FACT ARE NOT ERRONEOUS.

Engwicht challenges the District Court's findings of fact claiming the Court erred when it found that Engwicht agreed to pay Lako for drilling services regardless of whether Engwicht accepted a completed water well. Engwicht, however, admits that: 1) he agreed to pay Lako's standard rates for test drilling and if unsuccessful Lako would

drill for artesian water; 2) he agreed to pay Lako based on the depth of the drilling; and 3) the contract required no minimum flow. (Appellant's Brief at 3; footnotes 3 and 6.)

A contract can be either express or implied. An express contract is one where the terms are stated in words. N.D.C.C. § 9-06-01. An implied contract is one where the existence and the terms are manifested by conduct. N.D.C.C. § 9-06-01. A contract, be it oral or written, "requires an offer, and acceptance of that offer, and mutual acceptance and understanding of the offeror and offeree as to the terms of the legally enforceable obligation thus incurred." Cargill, Inc. v. Kavanaugh, 228 N.W.2d 133, 138 (N.D.1975). The parties' consent must be free, mutual, and communicated to each other. N.D.C.C. § 9-03-01. "Consent is not mutual unless the parties all agree upon the same thing in the same sense." N.D.C.C. § 9-03-16. To be valid and enforceable, a contract must be reasonably definite and certain in its terms, Delzer v. United Bank, 459 N.W.2d 752, 758 (N.D.1990). "so as to ascertain what is required of the parties," In re Estate of Hill, 492 N.W.2d 288, 293 (N.D.1992).

The existence of an oral contract must be proven by a preponderance of the evidence. Midland Oil & Royalty Co. v. Schuler, 126 N.W.2d 149 (N.D.1964). In meeting this burden, the terms of an oral contract can obviously be established only by extrinsic evidence. Matter of Estate of Hill, 492 N.W.2d 288. (N.D. 1992).

Here, the District Court, acting as fact finder, found an express oral contract was formed between Lako and Engwicht. (A at 19.) The District Court found that the cost of the well was dependent on whether it was a test hole, a test well or a completed well.

(A at 20.) The District Court found that Engwicht agreed to pay Lako for well drilling services regardless of whether Engwicht accepted a fully finished well. (A at 18.)

Engwicht challenges the District Court's finding that Engwicht agreed to pay Lako for services regardless of whether Engwicht accepted a fully finished well. Engwicht, citing to selective portions of Dale Lako's testimony, claims that Dale Lako testified that Engwicht was only obligated to pay Lako if Engwicht accepted a fully finished well. Engwicht further contends that the parties agreed that Engwicht would only be obligated to pay Lako if Engwicht received a fully finished well.

Engwicht's contentions are not supported by the record. Both Dale Lako and Alan Lako testified that they discussed with Engwicht Lako's standard charges for well drilling services and the fact that Lako charged for services regardless of whether the drilling produced a fully finished well. The District Court properly found that Lako drilled three holes for Engwicht.

Lako drilled a test hole to a depth of 240 liner foot. Under the parties contract, Engwicht was legally obligated to pay Lako \$1,200 for this hole (240 x \$5.00).

Lako drilled, cased and packed the first artesian well. Engwicht was legally obligated to pay Lako \$9,400 for this well (1200 x \$7.00 plus \$1,000). If this well would have been accepted by Engwicht, Engwicht would have been obligated to pay \$13,000 (1200 x \$10.00 plus \$1,000).

Lako drilled the second artesian well to a depth of 1200 feet. This well was not cased or packed. Engwicht was obligated to pay Lako \$7,000 (1200 x \$5.00 plus \$1,000) for this well.

Engwicht contends that Lako is not entitled to additional payment on the contract because Lako did not send additional bills to Engwicht and based on the fact that after Engwicht requested a receipt for his \$6,000 payment Lako sent a receipt which included the text "paid/thank you." Engwicht's contention are not supported by North Dakota law. The contract between the parties obligated Engwicht to pay Lako for all three wells. Initially, before Lako was sued for damages, Lako choose to not collect Engwicht's debt. Lako, however, was not legally obligated to forgive Engwicht's debt.

Engwicht contends he should pay nothing for the first artesian well (the second hole) because, according to Engwicht, Dale Lako unilaterally made the decision to pull the well casing to attempt to increase the water flow. Engwicht's factual contention is not supported by the record. Dale Lako testified that Engwicht was fully informed of the actions Lako was going to attempt to improve the flow. (T at 98.) Engwicht's assertion that he would have accepted the first artesian well is not believable in light of the fact that he hired Lako to replace his existing well which flowed at 2½ gallons per minute and based on his refusal to accept the second artesian well which also flowed at 2½ gallons per minute.

Engwicht contends the District Court erred when it awarded Lako \$4,500 in damages. Lako could have requested damages of \$11,600, calculated by subtracting the \$6,000 down payment from the total cost of the services provided. Lako was also, however, entitled to request a lower amount. Lako requested a lower amount, \$4,500. The District Court awarded this amount. The District Court's award is supported by the

record. The cost of the two artesian wells (\$16,400) exceeds the \$10,500 (down payment plus damage award).

Engwicht cites to two provision of the Uniform Commercial Code (N.D.C.C. §§ 41-02-55 and 41-02-56) in support of his argument that he is not obligated to pay for the services provided by Lako because Lako failed to deliver an acceptable artesian well. Neither of these sections, however, apply to this service contract. Equally inapplicable is Engwicht's reliance on N.D.C.C. § 32-03-13, . Damages for breach of agreement to convey realty.

CONCLUSION

The District Court's findings are supported by the evidence and are therefore not clearly erroneous.

Dated this 15th day of September, 2004.



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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NORTH DAKOTA)
) ss.
 COUNTY OF BURLEIGH)

The undersigned, being duly sworn, deposes and says that I am a citizen of the United States over the age of 18 years and not a party to the above-entitled matter; that on the 15 day of September, 2004, I served a copy of the following:

1. Brief of Appellee.

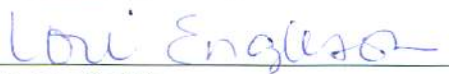
by placing a true copy in a postage paid envelope or envelopes addressed to each person named below, at the address stated below, which is the last known address of the addressee, and by depositing said envelope in the United States mail at Bismarck, North Dakota:

Jay Schmitz
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Valerie Ehrlich

Subscribed and sworn to before me this 15 day of September, 2004



Lori Engleson
Notary Public

